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No. 670

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL.,
Cross-Petitioners,

v.

MARSHALL P. SAFIR; ARNOLD A. WEISSBERGER; SAPPHIRE STEAMSHIP LINES, INC.; ANDREW E. GIBSON, Maritime Administrator; JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board/Maritime Administration; and MAURICE H. STANS, Secretary of Commerce, *Respondents.*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MARSHALL P. SAFIR; ARNOLD A. WEISSBERGER; SAPPHIRE STEAMSHIP LINES, INC.; ANDREW E. GIBSON, Maritime Administrator; JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board/Maritime Administration; and MAURICE H. STANS, Secretary of Commerce, *Respondents.*

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The undersigned attorneys, on behalf of American Export Isbrandtsen Lines, Inc.; American President Lines, Ltd.; Bloomfield Steamship Co.; Farrell Lines, Inc.; Lykes Bros. Steamship Co., Inc.; Moore-McCormack Lines, Incorporated; Prudential Steamship Co., Inc.; Prudential-Grace Lines, Inc.; and United States Lines, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Ap-

peals for the Second Circuit entered in this case on June 18, 1970 (App. 1)[1], the writ to issue only in the event this Court should grant the petition for a writ of certiorari in No. 388, this Term.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (App. 4a) and the initial opinion of the court of appeals (App. 7a) and its opinion on petition for rehearing (App. 18a) are not yet reported.[2]

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1970. A timely motion for rehearing and for rehearing *en banc* was denied on June 18, 1970 (App. 22a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals held the Maritime Subsidy Board precluded by collateral estoppel from "re-determining" whether certain steamship companies' actions violated section 810 of the Merchant Marine Act, 1936, where the Federal Maritime Commission had previously stated that those actions violated section 15 of the Shipping Act, 1916. The question presented

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[1] "App." refers to the Appendix to this conditional cross-petition for certiorari.

[2] These opinions are sequels to earlier decisions in this litigation reported *sub nom. Safir* v. *Gulick*, 297 F. Supp. 630 (E.D.N.Y. 1969), reversed, *sub nom. Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969).

is whether the court erred in giving collateral estoppel effect to the FMC Report where: (1) the FMC had no jurisdiction to decide Merchant Marine Act issues; (2) the Merchant Marine Act question was neither raised, litigated, nor decided in the FMC proceeding; and (3) different legal and policy considerations underlie the substantive Shipping Act and Merchant Marine Act provisions involved.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, and the Merchant Marine Act, 1936, 49 Stat., 1985 as amended, 46 U.S.C. 1101 *et seq.*, are reprinted in the appendix. (App. 1a).

STATEMENT

Background

This case arises from activities during 11 months in 1965 and 1966 by some members of the Atlantic and Gulf American-Flag Berth Operators — commonly called AGAFBO—with respect to their rates for transportation of household goods and other military cargo between certain American and European ports. AGAFBO was a conference of steamship companies, established under an agreement approved in accordance with section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and formed at the behest of the Military Sea Transportation Service for the purpose of negotiating rates for the ocean carriage of military cargo between the ports involved. Of the nineteen U.S.-flag companies comprising AGAFBO, nine, the cross-petitioners, had entered into operating-differential subsidy contracts with the Maritime Administration under Title

VI of the Merchant Marine Act, 1936 (46 U.S.C. 1171 *et seq.*).

In March 1965 Sapphire Steamship Lines, Inc.—formed by respondents Marshall P. Safir and Arnold Weissberger, its principal officers and stockholders—entered the trade in question. Sapphire declined an offer of membership in AGAFBO and filed a tariff with the Federal Maritime Commission containing rates significantly lower than the ones negotiated by AGAFBO with MSTS for that trade. AGAFBO protested to the FMC that Sapphire's rates were unreasonably low and uneconomic in violation of the Shipping Act and its tariff should therefore be rejected. The FMC, however, took no action. On March 25, 1965 AGAFBO notified MSTS that as a "temporary competitive measure" it was lowering its own rates to meet Sapphire's and filed an amended tariff to that effect with the FMC. These new rates remained effective until March 1, 1966. Shortly thereafter MSTS altered its procedures to procure ocean freight services through a system of competitive bidding rather than by negotiation, which resulted in some even lower rates for the cargo in question. Sapphire Steamship Lines, Inc., went out of business in March of 1967 and was adjudged bankrupt that May.

Investigation by the Federal Maritime Commission

In May, 1965, the Federal Maritime Commission on its own motion began an investigation into the practices surrounding the procurement of ocean transportation for military cargoes seeking to discover if there had been any violations of the Shipping Act, 1916.[3] The FMC's "Report" of the results of its inves-

[3] 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*

tigation, *Rates on U.S. Government Cargoes*, 11 F.M.C. 263 (December 8, 1967), exonerated AGAFBO from any Shipping Act violations except with respect to lowering its rates to match Sapphire's.

The Report acknowledged that whether those matching rates violated the Shipping Act was "moot", those rates having expired nearly two years previous and in the interim MSTS having abandoned negotiated rates in favor of competitive bidding. 11 F.M.C. at 279 and 286. The mootness of the question notwithstanding, the Report went on to state that the rates were unreasonably low and noncompensatory and violated sections 15 and 18(b)(5) of the Shipping Act, 46 U.S.C., 814 and 817(b)(5). Even though the FMC based its conclusion that AGAFBO's matching rates were uneconomic entirely on public statements by AGAFBO officials protesting the low level of Sapphire's identical rates, the Report upheld Sapphire's rates as not violative of the Shipping Act. 11 F.M.C. at 280.

The issue of whether by matching Sapphire's rates subsidized AGAFBO members had violated section 810 of the Merchant Marine Act, 1936, 46 U.S.C. 1227, was neither raised, decided nor discussed in the FMC Report. Nor did it include any order or directive requiring action on the part of AGAFBO or its constituents respecting rates. Neither AGAFBO nor any of its members sought judicial review of that Report.

The Preliminary Court Proceedings

While the Federal Maritime Commission, an independent administrative agency, administers the Shipping Act, 1916, implementation of the Merchant

Marine Act, 1936,[4] is entrusted to the Maritime Administration and the Maritime Subsidy Board, Executive Branch agencies in the Department of Commerce.[5] Section 810 of the Merchant Marine Act[6] provides in pertinent part:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under . . . this title . . . to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. * * *.[7]

Following the FMC Report, Sapphire's counsel wrote the Maritime Administrator and the Maritime Subsidy Board invoking section 810 and demanding that all subsidy payments to the subsidized AGAFBO lines be terminated and that the Administrator and the Board commence legal action to recover all subsidies

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[4] 39Stat. 728, as amended, 46 U.S.C. 1101 *et seq.*

[5] See Reorganization Plan No. 7 of 1961, 75 Stat. 840.

[6] 46 U.S.C. 1227.

[7] Section 810 also affords a treble damage remedy to persons injured by violators of the section. A separate action invoking that remedy was filed on behalf of Sapphire Steamship Lines, Inc., which is not involved in this litigation (Civil Action No. 2130-66, D.D.C.).

paid to those lines since March 29, 1965. When the Maritime officials did not accede to those demands, respondents Sapphire Steamship, Marshall P. Safir and Arnold Weissberger brought suit against them in the United States District Court for the Eastern District of New York to compel compliance. *Safir* v. *Gulick, supra,* n. 2.

The district court dismissed the action for lack of standing to sue but the Second Circuit reversed, finding jurisdiction under 28 U.S.C. 1337 and holding that an injured competitor had standing to seek to invoke the subsidy cut-off and recovery sanctions of section 810. *Safir* v. *Gibson, supra, n. 2.* The court of appeals further ruled that the provision did not bar present subsidy payments to steamship companies which had ceased their violations, and the Maritime Administration had discretion to determine whether to seek recovery of past subsidies from former violators for the period of their violations.

The Present Proceedings

Less than a month after that Second Circuit decision, the Maritime Subsidy Board commenced a formal hearing to "compile a public record which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810, Merchant Marine Act, 1936, as amended (46 U.S.C. 1227), has been violated and the appropriate action that should be taken." All the subsidized AGAFBO companies were made respondents in that proceeding together with Sapphire Steamship, Marshall Safir and Arnold Weissberger.

Sapphire and the other parties allied with it in interest refused to participate in that hearing. They moved

in the district court for an order restraining the government from paying any further subsidies to members of AGAFBO and directing recovery of subsidies previously paid. That court denied the motion for an injunction in all respects, concluding that if the Board's action was "[e]xpeditiously pursued, it might well meet every need of the present situation and every legally recognized interest of the plaintiffs." (App. 6a). In passing, the district court noted that the court of apeals had not previously found that "Section 810 had been violated, or that a finding of a violation of Section 15 is a finding of a violation of Section 810, and it did not indicate a finding that the AGAFBO members were 'current violators' of Section 810." (App. 6a).

Sapphire again appealed to the Second Circuit, which agreed with the trial court that the injunction to restrain the payment of current and future subsidies should be denied (App. 8a). However, the court of appeals then went on to decide a further issue which is the subject of this conditional cross-petition. The court concluded that the FMC statement that AGAFBO violated section 15 of the Shipping Act constituted as a matter of law a determination in substance that at least some members of the conference had violated section 810 of the Merchant Marine Act, 1936,[3] and directed the district court to instruct the

[3] The court of appeals acknowledged that, unlike section 15, section 810 can be violated only (1) by lines receiving subsidies under the Merchant Marine Act and (2) where the line adversely affected was exclusively a U.S. flag common carrier (App. 10a) and that proof of these two matters was still open before the Subsidy Board. It is not disputed, however, that cross-petitioners and five other AGAFBO companies are subsidized and Sapphire alleged in its complaint that it was a U.S. flag common carrier.

Maritime Administration not to redetermine that issue (App. 17a).

The court of appeals did not, however, direct return of subsidies paid during the period in question. Its decision left to the Maritime Administration the function of "investigating the nature and extent of the individual carriers' participation in the illegal action" and the discretion to determine "whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom." (App. 17a).

At this juncture cross-petitioners were granted leave to intervene in the court proceedings. These companies and the government all sought reconsideration of the aspect of the decision giving conclusive effect to an FMC finding made in a Shipping Act investigation on a Maritime Subsidy Board proceeding under section 810 of the Merchant Marine Act. On June 18, 1970 their petitions for rehearing or rehearing *en banc* were denied, the Second Circuit reiterating that in its own opinion the legal issue involved was correctly decided.

REASONS FOR GRANTING THE WRIT

1. The Reason for the Conditional Nature of This Cross-Petition

We recognize that the judgment of the court of appeals does not end this litigation. While it may bind the Maritime Subsidy Board to a finding that the conduct of some of the subsidized AGAFBO companies violated the standards of section 810, it remands to the Board the task of "investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom." (App. 17a).

There are thus many considerations for the Board to weigh before reaching its ultimate decision. Not least among them is the newly developed fact that the AGAFBO companies have now entered into an agreement with the Trustee in Bankruptcy of Sapphire Steamship Lines, Inc., for settlement of the treble damage action also brought against them by Sapphire under section 810 and the antitrust laws[9]. In light of these factors it is not possible to forecast the Board's ultimate action in this matter.

In the ordinary course, a case in this interlocutory posture would appear "not yet ripe for review" under the Court's practice. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). However, respondents Marshall P. Safir and Sapphire Steamship Lines, Inc., have also petitioned for certiorari from the same judgment of the court of appeals. *Safir* v. *Gibson*, No. 388 this Term.[10] For the reasons stated in our brief opposing that petition, we believe it raises no questions meriting further review and should therefore be denied. But if the Court determines to grant the petition in No. 388, for the reasons developed below we believe it should review the entire case and correct the improper and prejudicial application of collateral estoppel by the court of appeals. Accordingly, we have filed this conditional cross-petition which we ask be granted only if the Court grants the writ in No. 388.

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[9] *Smith, Trustee for Sapphire Steamship Lines, Inc.* v. *AGAFBO, et al.* (C.A. No. 2130-66, D.D.C.). Settlement with the Trustee in Bankruptcy was agreed upon after the decision below was rendered and is subject to approval of the bankruptcy court. An application for such approval is pending.

[10] Sapphire Steamship Lines' petition for certiorari in No. 388 is not being prosecuted by the Trustee in Bankruptcy or his counsel.

2. Reasons for Granting the Conditional Cross-Petition If the Petition in No. 388 Is Granted

The court below invoked the doctrine of collateral estoppel to preclude an administrative agency—the Maritime Subsidy Board—from determining the merits of a cause properly before it and within its primary jurisdiction. The Court has recognized that collateral estoppel has a place in administrative proceedings. However, its application in this case is clearly incorrect and directly conflicts with applicable decisions of this Court and other Circuits.

(a) Conflict with This Court's Decisions

The court below correctly recognized the "general rule against judicial interference with administrative proceedings prior to the issuance of a final order", citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Nevertheless, it thought itself free to ignore that rule by virtue of the Federal Maritime Commission's Report in *Rates on U.S. Government Cargoes*, 11 F.M.C. 263 (1967), an unappealed report that the AGAFBO conference had violated Section 15 of the Shipping Act, 1916, by matching certain rates offered by respondent Sapphire Steamship Lines even though believing the rates uneconomic. The thrust of the decision below was that the FMC Report that AGAFBO's conduct was "unjustly discriminatory" within the meaning of Shipping Act Section 15 necessarily determined that this conduct also violated section 810 of the Merchant Marine Act, 1936,[11] and therefore the Maritime Subsidy Board was collaterally estopped from "redetermining" that issue. That ruling is contrary to this Court's decision in *United*

[11] See n. 8, *supra*, p. 8.

States v. *R.C.A.*, 358 U.S. 334 (1959), respecting the application of collateral estoppel to administrative proceedings.

R.C.A. squarely holds that an administrative decision has no collateral estoppel effect in a proceeding before a second tribunal where the first agency was without authority to make a final determination of the issue in controversy. In that case, a district court dismissed as barred by *res judicata* and collateral estoppel the government's antitrust suit to enjoin the transfer of certain television station licenses, the FCC having previously considered the antitrust problems and approved the transfer in a proceeding based on the identical record in which the Justice Department had declined to intervene. This Court reversed, holding that (358 U.S. at 352):

> * * * before we can find the Government collaterally estopped by the FCC licensing, we must find "whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication *of the issue in controversy.*" *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 403 [Emphasis by Court]. But the issue in controversy before the Commission was whether the exchange would violate the public interest, not whether §1 of the Sherman Act had been violated. Consequently, there could be no estoppel. *Res judicata* principles are even more inappropriate.

In the case at bar, the Federal Maritime Commission had no authority to determine finally whether section 810 of the Merchant Marine Act had been violated, nor did it ever purport to make that determination. Rather, the issue in controversy before the FMC was whether AGAFBO's matching of Sapphire's rates violated

section 15 of the Shipping Act, the statute which the FMC administers. The Maritime Subsidy Board, not the FMC, has jurisdiction to decide all issues arising under section 810. *Reorganization Plan No. 7 of 1961,* 75 Stat. 840.[12] Since the first agency—the FMC—had no jurisdiction to decide the issue in controversy, under *R.C.A.* there could be no estoppel before the second agency—the Maritime Subsidy Board.

The egregiousness of the decision below is underscored by the court's attempt to bolster its use of collateral estoppel on the ground that when Congress enacted section 810, its administration was entrusted to the same agency then charged with enforcing the Shipping Act (App. 14a). But it was precisely because administration of these two statutes by one agency "had not proved to be satisfactory" that the President submitted and Congress accepted *Reorganization Plan No. 7 of 1961,* the principal purpose of which was to place these functions in independent agencies.[13] Thus, by holding the FMC decision under the Shipping Act a bar to independent consideration

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[12] Primary responsibility for the administration of the Merchant Marine Act, 1936, is vested in the Secretary of Commerce by that Plan and was delegated by him to the Maritime Administration and the Maritime Subsidy Board in that Department. 27 Fed. Reg. 3637 (1962). See *Pacific Far East Line, Inc.* v. *United States,* 394 F.2d 990, 992, n. 1 (Ct. Cl. 1968), and note 13, *infra.*

[13] See the Presidential letter transmitting *Reorganization Plan No. 7 of 1961* to Congress, H. R. Doc. No. 187, 87th Cong., 1st Sess. (1961), *U.S. Code Cong. & Adm. News,* 87th Cong., 1st Sess. (1961) p. 1363; *Report of the Antitrust Subcommittee of the House Committee on the Judiciary pursuant to H.R. Res. 56,* 87th Cong., Mar. 1, 1962 ("Celler Committee Report"); *Hearings Before the House Committee on Government Operations,* 87th Cong., 1st Sess. (1961), *passim; Hearings on Reorg. Plan No. 7 of 1961 Before the House Committee on Merchant Marine and Fisheries,* 87th Cong., 1st Sess. (1961) *passim.*

by the Maritime Subsidy Board of the Merchant Marine Act issue, the court below directly undercut a basic purpose of the 1961 reorganization. Certainly these circumstances do not justify the appellate court's disregard of *United States* v. *R.C.A., supra.*[14]

(b) Conflict among the Circuits

Another essential prerequisite to the invocation of collateral estoppel is that the issues actually litigated in both proceedings be identical. *Cromwell* v. *Sac County*, 94 U.S. 351, 353 (1877); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-98 (1948); *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89, 91 (1954). Where the issue in the second proceeding turns on the meaning of a section in an entirely different statute than considered in the first proceeding, the latter provision rarely if ever rests on legislative history, congressional purpose and statutory context identical to the former. At least five circuits and, apparently, the Court of Claims reject the application of collateral estoppel in these circumstances. *Norman* v. *Missouri Pacific Railroad*, 414 F.2d 73 (8th Cir. 1969); *Pacific Seafarers, Inc.*, v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 810 (D.C. Cir. 1968), *certiorari denied*, 393 U.S. 1093 (1969); *Title* v. *Immigration and Naturalization Service*, 322 F.2d 21 (9th Cir. 1963); *United States* v. *42 Jars*, 264 F.2d 666 (3rd Cir. 1959); *NLRB* v. *Pacific Intermountain Express Co.*, 228 F.2d 170, 176 (8th Cir.

[14] The Second Circuit's reliance on *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), was plainly misplaced. The rationale of that decision as to the application of collateral estoppel is the same as—and was cited in—*United States* v. *R.C.A.* Unlike the circumstances in *R.C.A.* and the instant case, the Bituminous Coal Board in Sunshine did have authority to decide whether the Bituminous Coal Act applied to Sunshine's business and, having so decided, its decision was entitled to collateral estoppel effect in a later proceeding by the Collector of Internal Revenue to collect a tax payable if that Act applied.

1955), *certiorari denied*, 351 U.S. 952 (1956); *Lane* v. *Railroad Retirement Board*, 185 F.2d 819 (6th Cir. 1950); and see *Phelan* v. *United States*, 146 Ct. Cls. 218, 221-222 (1959). On the other hand, *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944), for example, is squarely to the contrary.[15]

The court below ignored the "two statute" rule and, without guidance from the agency with primary jurisdiction, decided that both the Shipping Act and Merchant Marine Act provisions proscribed the identical conduct and therefore collateral estoppel barred the Maritime Subsidy Board from redetermining the issue. Entirely apart from the fact that the court interpreted section 810 contrary to the contemporaneous and consistent administrative interpretation of those entrusted with carrying out that law,[16] and disregarding the administrative law precept that administra-

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[15] Professor Davis' treatise summarizes the law on whether issues can ever be identical where two statutes are involved as follows: "The cases hold both ways and cannot be reconciled." 2 Davis, *Administrative Law Treatise* (1958 ed.), § 18.04 p. 579.

[16] Accepting *arguendo* that the AGAFBO rate reductions were "discriminatory" within the meaning of § 15 of the Shipping Act, Merchant Marine Act § 810 has consistently been understood as directed toward a situation entirely distinct from the rate problems involved in this case. The section was inserted in the Merchant Marine Act on the motion of Senator O'Mahoney after he heard testimony that a U.S.-flag shipline had been refused admission to a shipping conference. It is this "discriminatory" practice which it proscribes, according to contemporaneous and consistent administrative interpretation. See 80 CONG. REC. 10076 (1936) (remarks of Senator O'Mahoney); *Hearings on S. 3078 Before the Senate Committee on Commerce*, 75th Cong. (1938), p. 902 (testimony of U.S. Maritime Commission Chairman Joseph P. Kennedy); *Isbrandtsen Co., Inc.* v. *American Export Lines, Inc.*, 4 F.M.B. 442, 453 (1954); *Isbrandtsen Co., Inc.* v. *American Export Lines, Inc.*, 4 F.M.B. 772, 784 (1956); and *American Presi. Lines—Sec. 810 Violation*, 6 P. & F., S.R.R. 57, 61-62 (1965). As noted above, Sapphire was not excluded from AGAFBO; rather it declined an offer of membership.

tive agencies determine in the first instance the effect to be accorded prior agency determinations,[17] the application of the doctrine of collateral estoppel by the Second Circuit in this case conflicts with the decisions of four other Circuits cited above.

(c) The Importance of the Decision Below

The application of the doctrine of collateral estoppel in administrative proceedings is of importance not only to cross-petitioners in this particular case, but as a general matter of federal law. It is significant to cross-petitioners because as a result of the applications of that doctrine—improperly in our view—their entitlement to literally tens of millions of dollars in funds under fully performed bilateral contracts with the Maritime Administration have been put in question.[18] It would impose a severe, if not impossible, financial burden on these carriers to repay these funds, which in large measure subsidized not the steamship companies but the employment of American seamen.[19]

Second, as Professor Moore has observed, the scope of collateral estoppel is "dangerously" broad.[20] He correctly points out that:

> Because the effect of collateral estoppel, unlike that of res judicata, is not limited to the cause of

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[17] *SEC* v. *Otis & Co.*, 338 U.S. 843, reversing 176 F.2d 34 (D.C. Cir. 1949); *Brandonfels* v. *Day*, 316 F.2d 375, 378 (D.C. Cir. 1963): "Whether . . . the F.T.C. would be barred [by a prior administrative determination on the same issue by another administrative agency] is a question for the initial determination of that agency", 316 F.2d at 378, per Justice Reed sitting by designation.

[18] Subsidy agreements under the Act are bilateral contracts mutually beneficial to the government and the companies. See *Pacific Far East Line, Inc.* v. *United States*, 394 F.2d 990 (Ct. Cl. 1968).

[19] See 46 U.S.C. 1173(b), and *S. Rep. No. 1721*, 74th Cong., 2nd Sess. (1936), pp. 6, 18.

[20] 1B Moore, *Federal Practice* (2d ed. 1965), par. 0.441, p. 3780.

> action asserted in the initial suit, but extends to other claims arising between the parties, unforeseeable and sometimes unjust results are possible, especially if the doctrine is applied without some degree of flexibility. This danger exists when the issues concluded relate to facts on which numerous subsequent actions might be based, and, because of the smaller likelihood of foreseeability, *it is even greater when the concluded issues relate to questions of fact or law that might be determinative in a completely unrelated controversy.* (Emphasis supplied).[21]

The widening jurisdiction of federal administrative agencies and the judicial recognition that collateral estoppel principles apply to agency decisions[22] make the proper application of that doctrine in such proceedings an important question of administrative law.[23]

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[21] *Ibid.*

[22] *United States* v. *Utah Construction Co.*, 384 U.S. 384 U.S. 394, 421-422 (1966); *United States* v. *42 Jars*, *supra*, 264 F.2d at 669: "There is a growing recognition of the doctrine of res judicata as applied to action by administrative tribunals. It takes fifty-one pages in Professor Davis' book on Administrative law to discuss it. We shall, no doubt, have growth in this area." See also, 2 Davis, *Administrative Law Treatise* (1958 ed.) §18.04, and cases cited; and note, *The Application of Res Judicata to Administrative Determinations*, 1970 *Duke L. J.* 67, 133-146.

[23] Should the Court grant this cross-petition, we would also urge that collateral estoppel was improperly invoked below because the FMC "Report" was "moot" by the Commission's own admission, did not require any changes in rates or other activities by the AGAFBO lines and was not, therefore, an appealable order under the then decided case law. *Sea-Land Service* v. *Federal Maritime Commission*, 402 F.2d 631 (D.C. Cir. 1968); *Isbrandtsen Co.* v. *United States*, 211 F.2d 51, 55 (D.C. Cir. 1954). The apparently contrary decision in *Pacific Far East Line, Inc.* v. *FMC*, 410 F.2d 257 (D.C. Cir. 1969), relied on by the court below, is not appropriate to this point. First, whether the FMC Order in that case was appealable was not raised in the litigation; second,

CONCLUSION

For the reasons stated, if the Court grants the petition in No. 388 this cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

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September 11, 1970

(Footnote 23 Continued)

the case was decided nearly two years after the time expired in which to appeal the FMC "Report" here in suit. The statement of the court below that the AGAFBO lines had incentive to appeal because otherwise the adverse FMC Report would be conclusive in an action for civil penalties under 46 U.S.C. 814 simply disregards a prior decision that the lines would have been entitled to a trial *de novo* in such a penalty suit. *United States* v. *Anchor Line, Ltd.*, 257

F. Supp. 99 (S.D.N.Y. 1965). *Cf. Damsky* v. *Zavatt*, 289 F.2d 46 (2nd Cir. 1961) (taxpayer entitled to a jury trial *de novo* in a suit for penalties for nonpayment of tax as a matter of constitutional right, per Friendly, J). The application of collateral estoppel in these circumstances was thus a serious injustice imposed on cross-petitioners. See, *The Evergreens* v. *Nunan*, 141 F.2d 927, 929 (2d Cir. 1944, per L. Hand, J).

Finally, four of the cross-petitioners would urge that they in particular had no incentive to appeal the FMC's Report and, indeed, could not have effectively prosecuted an appeal: These lines did not serve the trade involved, had no rates applicable to that trade, and did not participate in any way in the establishment of the rates found to have been unlawful. They were confident no penalty case could have been made out against them, and, in fact, the Justice Department sought no penalties from them in connection with a pre-litigation settlement made with the other lines. Moreover, since these lines did not serve the trade, they had no costs against which to measure the reasonableness of the rates (*Hong Kong Inbound Investigation*, 11 FMC 168 (1967)) and consequently could not have contributed to the resolution of that crucial issue nor have effectively appealed its adverse determination.

APPENDIX

Statutes Involved

Section 810 of the Merchant Marine Act, 1936, 49 Stat. 2015, 46 U.S.C. 1227, provides:

It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, provides:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other per-

son subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or

other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

Opinion of the District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

68 C 643

MARSHALL P. SAFIR, ARNOLD WEISSBERGER and SAPPHIRE STEAMSHIP LINES, INC., *plaintiffs*

JAMES W. GULICK, Acting Maritime Administrator Martitime Administration, U.S. Department of Commerce, et al., *defendants*.

DOOLING, D. J.

Plaintiffs now move, essentially on the opinion of the Court of Appeals, the decision of the Federal Maritime Commission of December 12, 1967, in Docket No. 65-13, and the provisions of Section 810 of the Merchant Marine Act 1936, 46 U.S.C. §1227, for an injunction restraining the defendants from making any further payment of operating or construction differential subsidies to the AGAFBO members which have violated Section 810. The essential argument is that the Court of Appeals has held that Section 810 is "mandatory where applicable," that the violation of Section 15 of the Shipping Act, 1916 (46 U.S.C.

§814) has been established by the decision of December 12, 1967, and that in consequence subsidies must now be halted instanter under the command of Section 810. Plaintiffs contend that since Sapphire remains bankrupt and forced out of business although desirous of reentering the trade, and the AGAFBO members allegedly continue in guilty enjoyment of the traffic their predatory rates disabled Sapphire from carrying, the AGAFBO members cannot be said to have effected that "return to the paths of virtue" which alone under the Court of Appeals opinion—plaintiffs argue—would excuse their being mandatorily debarred from subsidies as "current violators." Plaintiffs argue that the Maritime Subsidy Board, Maritime Administration, flouted rather than gave effect to the decision of the Court of Appeals when it initiated by the Order of October 24, 1969, the proceeding to compile a record which will provide a basis for recommending to the Board whether Section 810 has been violated and the appropriate action that should be taken.

The Board has indeed formally initiated such a proceeding on notice to all parties in interest, and it has impliedly answered in the negative the inquiry made by the Court of Appeals: Did the Maritime Administration make a considered decision whether or not to recover the subsidies paid in the past. Again impliedly, it has now embarked on the task and means to make a considered decision and to make it on grounds consistent with the statute. See Slip Opinion, page 3511.

Plaintiffs' argument must be rejected and their motion for an injunction denied. The Court's resolution of the problem of statutory interpretation was to read the statute as mandating arrest of subsidy payments so long as Section 810 violation continued, and as according the injured competing carrier interest in and standing to question the Administrator's failure to seek a recovery of subsidies so paid. The two parts of the Court's holding are

perfectly congruent. The Court did not find that Section 810 had been violated, or that a finding of a violation of Section 15 is a finding of a violation of Section 810, and it did not indicate a finding that the AGAFBO members were "current violators" of Section 810.

The current action of the Board cannot be regarded as improper. Expeditiously pursued, it might well meet every need of the present situation and every legally recognized interest of the plaintiffs. What further steps should be taken in the present action to assure diligent procedure by the Board and to determine the future shape of the present case should be made the subject of early applications by the parties.

It is

ORDERED that the motion for an injunction is in all respects denied.

Brooklyn, New York
December 9, 1969.

s/ JOHN F. DOOLING, J.
U. S. D. J.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.

(Argued February 13, 1970 Decided February 26, 1970)

Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISSBERGER and SAPPHIRE STEAMSHIP LINES, INC.,

Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Martitime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,

Appellees.

Before:

LUMBARD, *Chief Judge*

FRIENDLY and FEINBERG, *Circuit Judges.*

Appeal from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, denying an injunction against the defendants from making further subsidy payments to members of a steamship conference who had allegedly violated §810 of the Merchant Marine Act of 1936. Modified and affirmed.

FRIENDLY, *Circuit Judge*:

This appeal is a sequel to our decision in *Safir* v. *Gibson*, 417 F.2d 972 (1969), where we held that under §810 of the Merchant Marine Act, 1936, 46 U.S.C. §1227, the Mari-

time Administration was "required to make a considered decision whether to recover the subsidies paid in the past" to members of AGAFBO who had been found by the Federal Maritime Commission (FMC) to have violated §15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814. Rates on U.S. Government Cargoes, Docket No. 65-13, 11 F.M.C. 283 (1967). After our decision was handed down, the Maritime Subsidy Board of the Maritime Administration initiated a proceeding, Docket No. S-243, on October 24, 1969, directing its chief hearing examiner to conduct an investigation and compile a public record "which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810, Merchant Marine Act, 1936, as amended (46 U.S.C. §1227), has been violated and the appropriate action that should be taken." Steamship lines that were members of AGAFBO and received operating-differential subsidies during the period of the violations and the plaintiffs here were named as parties. Dissatisfied with this procedure, plaintiffs moved the District Court for the Eastern District of New York to issue an injunction restraining the defendants "from making any further payments of operating or construction differential subsidies to the members of AGAFBO which have violated Sec. 810 of the Merchant Marine Act, 1936" and to grant other appropriate relief. Judge Dooling denied the motion in all respects.

Insofar as the district court refused to enjoin current subsidy payments, its action was clearly consistent with our opinion, indeed compelled by it. We said we did not believe that §810 protected "the interest of a carrier in having former violators barred from ever receiving subsidy payments despite their return to the path of virtue," and sharply distinguished making current payments to former violators from refusing to seek recovery of payments during the violation, 417 F.2d at 977. Plaintiffs do not charge that the AGAFBO members now receiving subsidy payments are violating §810 or indeed that they have done so

since March 1, 1966. The argument that these carriers will not have returned "to the path of virtue" until they have refunded all subsidy payments received during the period of violation is a far-fetched misreading of our decision.

On the other hand, while the district court was literally correct in its conclusion that we "did not find that Section 810 had been violated, or that a finding of a violation of Section 15 is a finding of a violation of Section 810 . . ," the primary reason why we did not do the latter was that the question was not raised. We called attention to the failure of the AGAFBO lines to seek intervention and rather pointedly invited them to do so, 417 F.2d at 970 n. 4. Their decision to remain on the sidelines should not prevent us from making a decision that will spare the plaintiffs the necessity of going through a costly and time-consuming redetermination of matters that have already been heard and decided by the agency having authority in the premises.

Section 810 of the Merchant Marine Act, 1936, makes it unlawful

> for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizens of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

Section 15 of the Shipping Act directs the Commission to disapprove any agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports . . . or to operate to the detri-

ment of the commerce of the United States, or to be in violation of this chapter . . ." Section 18(b)(5), 46 U.S.C. §817(b)(5), added in 1961, 75 Stat. 764, directs the Commission to disapprove "any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." A finding by the FMC that the rates of the AGAFBO members were unjustly discriminatory or unfair as between carriers would thus determine the same conduct as would constitute a violation of §810, subject only to proof that the AGAFBO lines were receiving operating-differential subsidies at the time and that the carrier adversely affected was a "citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established route from and to a United States port or ports."

When we turn to the discussion by the FMC in Docket No. 65-13, Rates on U. S. Government Cargoes, 11 F.M.C. 263, 279, 283 (1967), we find the following:

> We consider now the AGAFBO reduced rates which became effective March 29, 1965. As previously seen, MSTS was informed by AGAFBO that the reductions were temporary and for competitive purposes only, and that they were not believed to be fair, reasonable, or compensatory. There can be little doubt that the drastic reductions were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military cargo. Since the rate reductions were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade, we agree with the examiner and, under the circumstances, conclude that the reduced rates were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act.

Thus, we will consider whether the rate reductions offended the provisions of section 15. AGAFBO itself characterized its reduced rates as unreasonably low. The operating data submitted by AGAFBO show that this admission was accurate. The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its rate-making functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. Isbrandtsen Co., Inc. v. United States, 214 F.2d 51 (D.C. Cir. 1954), cert. denied, 347 U.S. 990 (1954). We, therefore, conclude that the AGAFBO agreement operated in a manner which was in violation of section 15.

The Commission's "Ultimate Conclusions" included, 11 F.M.C. at 287:[1]

2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in

[1] Two of the four members who participated would have gone further and have held that AGAFBO's anticompetitive activities against Sapphire went beyond the scope of the conference agreement and violated §15 on that ground, 11 F.M.C. at 288-90.

an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).

3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

4. AGAFBO did not otherwise violate the Shipping Act.

The only basis we can perceive for arguing that the FMC's findings did not determine that AGAFBO's rates were "unjustly discriminatory or unfair" to Sapphire is that, rather than make an explicit finding to that effect, it chose to place decision on the ground that AGAFBO violated section 15 by knowingly and willfully setting rates which "were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act." But to rest anything on that would be hypertechnical. The reason why the rates were found to be "so unreasonably low as to be detrimental to the commerce of the United States" was because the reductions "were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade." 11 F.M.C. at 279. The FMC's refusal to find that the AGAFBO lines "conspired to drive Sapphire from the trade in violation of section 15," 11 F.M.C. at 282, and its fourth conclusion, "AGAFBO did not otherwise violate the Shipping Act," do not justify a contrary result. Section 810 is violated not only when an agreement by a subsidized carrier is unjustly discriminatory or unfair to another American-flag carrier

but when such carriers "engage in any practice in concert with another carrier or carriers by water" having that effect. While "practice" covers matters other than rates, see *California* v. *United States*, 320 U.S. 577 (1944), the framers of §210 surely thought that the fixing of unjustly discriminatory or unfair rates aimed at an American-flag carrier pursuant to a conference agreement would constitute a "practice." See *Empire State Highway Ass'n* v. *F.M.B.*, 291 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 368 U.S. 931 (1961); compare *F.M.C.* v. *New York Terminal Conference*, 373 F.2d 424, 427 (2 Cir. 1967).

Since the AGAFBO lines and Sapphire were parties to the FMC proceeding and the FMC was there the authorized representative of the United States as the Maritime Administrator is in the case now pending, see *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), any "privity" that may be required for giving the FMC's determination the effect of collateral estoppel in the Maritime Administration proceeding exists. The Supreme Court has recently observed that "language to the effect that res judicata principles do not apply to administrative proceedings . . . is certainly too broad" and that "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966). While the issues here may not have been purely factual, they were fully litigated before the agency designated to determine them. Cf. *Tampa Phosphate R.R.* v. *Seaboard Coast Line R.R.*, 418 F.2d 387, 396 (5 Cir. 1969). The Restatement of Judgments, §70, says that even determinations of questions of law are conclusive between the parties on a different cause of action unless injustice would result. The only possible injustice we can perceive from giving the FMC's determinations the effect

of collateral estoppel in the Maritime Administration case arises from the fact that, in view of the relatively slight sanctions imposed in Docket No. 65-18, 11 F.M.C. at 288, namely, required modifications in the conference agreement, the AGAFBO carriers had no sufficient incentive to seek judicial review. However, the Commission's finding that AGAFBO violated section 15 of the Shipping Act subjected the member lines to a potential liability of $337,000 each under that section, and supplied ample motive for them to seek judicial review even if they did not anticipate the possible use of the FMC's conclusions in a subsequent Maritime Administration proceeding.

It is the FMC, not the Maritime Administration, that has the expertise to pass on whether rates are unfair or unduly discriminatory, cf. *Far East Conference* v. *United States*, 342 U.S. 570 (1952), and it would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it, see 2 Davis, Administrative Law Treatise §18.12 at 626 (1958). Any objection on the ground that two different statutes are involved, see *id.* § 18.04 at 576-80, is more than overcome in this case by the point that when Congress enacted §810, the administration of subsidies was entrusted to the same agency, the United States Maritime Commission, that was to enforce the Shipping Act. See 46 U.S.C. §1111, Historical Note, and our earlier opinion, 417 F.2d at 975 n. 2. The 1936 Congress would hardly have expected that after the USMC had found that rates were unjustly discriminatory and unfair while wearing its Shipping Act hat, it would reexamine that conclusion on assuming its hat under the Merchant Marine Act, 1936. The separation of functions in 1950, whereby authority on rate matters passed to what is now the Federal Maritime Commission, should not alter the result.

We recognize there is a general rule against judicial interference with administrative proceedings prior to the issuance of a final order, see *Myers* v. *Bethlehem Ship-*

building Corp., 303 U.S. 41 (1938); *ABC Air Freight Co. v. CAB*, —— F.2d ——, —— (2 Cir. 1969), slip opinions 183, 194-95. Nevertheless we believe two features of this case make it appropriate for us to direct conformity with our views on the preclusive effect of the FMC decision here and now. First, the reason for applying *res judicata* to administrative agencies is not only to "enforce repose" but also to protect a successful party from being vexed with needlessly duplicitous proceedings. 2 Davis, Administrative Law Treatise §18.12 (1958). If the latter interest is not protected at the outset of the second proceeding, it will be lost irreparably. Cf. *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 86-87 (2 Cir. 1961), *cert. denied*, 368 U.S. 986 (1962). In this respect, a claim of *res judicata* differs from a claim that an administrative agency has no jurisdiction over the subject matter of the investigation, as in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540 (1946); and *FPC v. Arkansas Power & Light Co.*, 330 U.S. 902 (1947), an issue which Congress meant to be decided in the first instance by the agency itself.

SEC v. Otis & Co., 338 U.S. 843, *rev'g* 176 F.2d 34 (D.C. Cir. 1949), is not to the contrary. There the SEC, in the course of an investigation, had sought enforcement of a subpoena compelling an attorney to testify to conversations with a client, alleging that the evidence theretofore compiled amounted to a *prima facie* showing that the client had consulted the attorney for a fraudulent purpose. The district judge found the evidence insufficient and denied enforcement. Subsequently the Commission announced its intention to determine whether the client's securities firms should be suspended or expelled from membership in the National Association of Securities Dealers because of its participation in the alleged fraud. The firm and the client, alleging that the Commission had no new evidence of fraud, sought a declaratory judgment that the prior determination was *res judicata* on the existence *vel non* of substantial

evidence of fraud, and an injunction against the inquiry. The district court dismissed the complaint, the court of appeals reversed, and the Supreme Court reversed on the petition for certiorari in a brief *per curiam* citing the *Myers, Macauley, and Arkansas Power & Light Co.* cases, *supra.*

This case is clearly distinguishable. In *Otis*, all parties appeared to agree, and we think correctly, that the SEC would not have been precluded by the prior determination if it had been able to come up with new evidence of fraud. Under the court of appeals holding, in order to avoid an injunction against the second proceeding, the SEC had to produce new evidence of fraud, the very matter which the proceeding was designed to discover. It would turn the administrative process on its head if, before the agency could make a determination, it had to convince a court that this would be supported by substantial evidence. Here, by contrast, the quantum of evidence to support or refute the FMC's determination is not relevant. The only issues are what that agency in fact determined and whether that determination is binding on the Maritime Administrator. The conclusions we have reached clearly follow from the face of the record and the relevant principles of statutory and administrative law.

There is a second feature justifying judicial intervention at this stage. While the proceeding before the Maritime Subsidy Board is not being held pursuant to a court order, such an order surely would have issued under 28 U.S.C. §1361 if the agency had not, by a timely compliance, made it unnecessary. If such an order had issued, the court would have had discretionary power to modify or clarify it if such action appeared necessary because the agency misunderstood the nature of the proceeding required. Its power is no less because the agency willingly, if to some extent mistakenly, attempted to comply with the thrust of our prior decision before being ordered to do so.

We emphasize that the court's power to clarify the nature of the proceeding which the agency must undertake does not mean that exercise of that power is necessary, or even appropriate, in every dispute that may arise over the manner in which the proceeding is being conducted. In most situations, the reasons for the normal exhaustion requirement will prevail over anything to be gained by immediate intervention. Here, however, there is nothing to be gained and much to be lost by waiting for the agency to finish its deliberation without receiving proper instructions.

We therefore direct the district court to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire.[2] With this modification, the order denying an injunction is affirmed. No costs.

[2] Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

Opinion of the Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.

(Decided June 18, 1970.)

Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISBERGER and SAPPHIRE STEAMSHIP LINES, INC.,

Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,

Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO.; LYKES BROS. STEAMSHIP COMPANY, INC.; MOORE-McCORMACK LINES, INC.; UNITED STATES LINES, INC.; AMERICAN PRESIDENT LINES, LTD.; PRUDENTIAL STEAMSHIP CO., INC. and PRUDENTIAL GRACE LINES, INC.; and FARRELL LINES, INC.,

Intervenors.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and FEINBERG, *Circuit Judges.*

On Petitions of Intervenors for Rehearing

PER CURIAM:

In our decision of February 26, 1970, —— F.2d ——, slip opinions 1697, we directed the district court "to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Shortly thereafter, the AGAFBO lines, which, although fully aware of this action, had been sedulously abstaining from participation, see 417 F.2d 972, 976 n. 4 (1969); —— F.2d at ——, sought leave to intervene for the purpose of seeking a rehearing on that portion of our decision. We granted such leave, received petitions and accompanying briefs, and then called upon counsel for the appellants and appellees to respond.[1]

The argument most strongly pressed by the intervenors is that they had no sufficient incentive and, indeed, no opportunity to appeal the adverse findings of the FMC, see —— F.2d at ——, slip opinions at 1705. The latter branch of the argument hangs mainly on the fact that the rates found by the FMC to give rise to a violation of §15 of the Shipping Act had expired and therefore could no longer be disapproved under §18(b)(5). But §15 subjects offending lines to a penalty of $1000 per day of violation. Since the FMC's determination would be conclusive in a civil action for penalties, it was therefore clearly appealable. See *Pacific Far East Line, Inc.* v. *FMC*, 410 F.2d 257 (D.C. Cir. 1969). In view of the sharp tone of the FMC report and

[1] We requested counsel for the appellees to obtain the views of the Federal Maritime Commission. The latter, taking no position with respect to other issues, has advised "that its sole concern here, in the context of its responsibilities under the Shipping Act, is to insure that the finality of its determinations is preserved and that its factual findings will not be litigated long after the statutorily prescribed time for judicial review has run and in proceedings to which it is a stranger." This was the precise object of our decision.

the even sharper one of the separate opinion of two members, the intervenors could hardly have taken lightly the threat of the Government's suing for a penalty; indeed, we are informed that five of them have recently settled their liability by paying $25,000 each. Moreover, while we relied mainly on this point, —— F.2d at ——, slip opinions at 1705, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in a proceeding under §810 of the Merchant Marine Act, of whose potentiality they were apprised very shortly after the FMC decision.

The Government makes the point that if appellants wished to have the Maritime Subsidy Board give conclusive effect to the FMC decision, the Board has a procedure enabling them to raise this matter *in limine*. They could have moved for a summary disposition of the issue by the Hearing Examiner, 46 C.F.R. 201.91, could have requested permission from him to appeal an adverse decision to the full Maritime Administration, 46 C.F.R. 201.93, and if that were granted and the appeal proved unsuccessful, could have sought further review by the Secretary of Commerce, 46 C.F.R. 202.1. Be all this as it may, we were faced with a statement by the district judge implying that the FMC determination did *not* have binding effect, —— F.2d at ——, slip opinions at 1699-1700, and, after two and a half years, we see no point in launching appellants on the wearisome course the Government has plotted when we are clear that the legal issue must be decided in their favor. The short of the matter is that nothing advanced by the intervenors or the Government alters our conclusion that "it would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong in a fully litigated issue the decision of which Congress had confided to it." —— F.2d at ——, slip opinions at 1705.

Two minor points should be mentioned. Four intervenors, American President Lines, Ltd., Prudential Steam-

ship Co., Inc., Prudential-Grace Lines, Inc., and Farrell Lines, Inc., urge that they were not competing with Sapphire, had no interest in the rates which the FMC condemned and never voted on these. We see no reason for the concern felt by these carriers. We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relitigated before the Maritime Administration; we said nothing about who was responsible for these and, by a footnote 2, emphasized that "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action . . ." On the other side, the Government is fearful lest "the tenor of the opinion and the rationale underlying it would appear to foreclose the Maritime Subsidy Board from investigating and concluding, contrary to a majority of the FMC, that a wider conspiracy existed." But there was no "majority" finding on the issue of a wider conspiracy, since the four participating members divided two to two. The issue therefore remains open.

The intervenors' petitions for rehearing are denied.

Order of the Court of Appeals Denying Rehearing En Banc

34355

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MARSHALL P. SAFIR, ARNOLD WEISSBERGER, and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs-Appellants,

v.

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, et al.,
Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., et al.,
Intervenors.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for intervenors American Export Isbrandtsen Lines, Inc., et al., and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is dneied.

/s/ J. EDWARD LUMBARD

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Chief Judge

June 18, 1970